

TITLE SUIT NO:21 OF 2013
PLAINTIFF: SHRI NASIR HUSSAIN & ANR
DEFENDANTS: SHRI ABDUS SAMAD & ORS

Form no. (J) 2

Heading of judgment in original suit/ case

In the original court of the Civil Judge, Dhubri

Present: Yusuf Azaz

Thursday, the 25th Day of January, 2017

TITLE SUIT NO.21/ 2013

- 1) SHRI NASIR HUSSAIN
- 2) SHRI SHANTI UDDIN SHEIKH

Plaintiffs

versus

- 1) SHRI ABDUS SAMAD
- 1) SHRI HALIM SHEIKH
- 2) SMTI BULU KHATUN
- 3) SMTI SARA BEWA

Defendant/s

Proforma Defendants

This suit/ case coming on for final hearing on 16/11/2017 in the presence of –

SHRI A. R AHMED, Advocate for the plaintiff; and

SHRI N.A SK, Advocate for the defendants,

and having stood for consideration to this day, the court delivered the following judgment-

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YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

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JUDGMENT

1. The plaintiffs have instituted this suit against the defendant for the specific performance of the contract to sell the suit land.
2. The brief facts leading to this case, as is revealed from the plaint, is that:
3. The plaintiffs, Shri Nasir Hussain and Shri Shanti Uddin Sk had pleaded that the principal defendant, Shri Abdus Samad is the owner of a plot of land measuring about 4 Kathas 4 Lessas covered by Dag no: 5 and 6 of Patta no:116 of Khatian no:131 situated at village- Kazipara Part II (more particularly described in the schedule of the plaint and hereinafter referred to as the suit land). According to the plaintiff, the principal defendant used to reside out of station for his livelihood and as such he gave a power of attorney in favour of the plaintiffs so as to deal with the suit land. Later on, the plaintiffs desired to purchase the suit land and accordingly the plaintiffs and the principal defendant entered into an agreement on 18/10/2010 and it was agreed that the total sale consideration of the suit land would be Rs.8,40,000/- and out of the aforesaid total sale consideration, the plaintiffs paid an amount of Rs. 2,50,000/- to the defendant as advance and it was agreed that the balance amount of Rs. 5,90,000/- would be paid at the time of registration of the formal sale deed. According to the plaintiffs they had arranged for the remaining balance amount and also requested the defendant to accompany them so as to obtain the necessary sale permission from the concerned authorities but the defendant initially avoided and later on refused; hence the plaintiffs issued notice to the defendant to register the formal sale deed by receiving the balance sale consideration, but the said notice returned without service as the same was refused by the defendant; hence this suit praying for the specific performance of the

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contract for sale of the suit land.

4. The principal defendant and the proforma defendants filed their joint written statement stating therein that they are the joint owners in respect of a plot of land 2 Bighas 1 Katha 3 Lessas, of which the suit land is a part. According to the defendants, the principal defendant had earlier sold a plot of land measuring about 1 Katha 5 Lessas to the plaintiff no:1, Shri Nasir Hussain besides the suit land. The defendants also admitted that the principal defendant had to go to Haflong for his livelihood and as such he gave a power of attorney to the plaintiff no:1, Shri Nasir Hussain to look after the suit land, but the plaintiff no:1 and the plaintiff no:2, Shri Shanti Uddin Sk, who is a lawyer conspired and drafted out the power of attorney jointly in their favour by authorizing them to sell the suit land on behalf of the principal defendant, even though the plaintiff never agreed to the same. The defendants pleaded that the principal defendant is illiterate and as such the plaintiffs got his signature in the said power of attorney no:140(iv) dated 16/6/2010. The defendants further pleaded that the principal defendant never agreed to sell the suit land in favour of the plaintiffs and never executed any agreement of sale (Bainapatra) dated 18/10/2010 and also never received any advance amount of Rs. 2,50,000/- from the plaintiffs and as such there is no question of specific performance of any such agreement of sale. The defendants alleged that the alleged agreement of sale is forged; hence prayed for dismissal of the suit. The defendants further pleaded that the principal defendant earlier wanted to sell the suit land and shift to Jogighopa but he had shelved his plan and as such at present he does not want to sell the suit land; hence prayed for dismissal of the suit.

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5. Upon the pleadings of the parties, the following issues were framed in this suit-

(1) Whether the suit is maintainable?

(2) Whether the suit is barred by limitation?

(3) Whether the plaintiffs entered into the legally enforceable contract dated 18/10/2010 to purchase the suit land from the defendant, Shri Abdus Samad?

(4) Whether the defendant, Shri Abdus Samad received Rs. 2,50,000/- as advance to sell the suit land to the plaintiffs?

(5) Whether the defendant, Shri Abdus Samad refused to perform his part of the contract?

(6) Whether the plaintiffs were/ are ready and willing to perform their part of the contract?

(7) Whether the plaintiff is entitled to the reliefs as prayed for?

(8) To what relief/ reliefs, if any, the parties are entitled?

6. I have heard the arguments put forwarded by both the parties. Both the parties have adduced evidence in support of their respective case.

7. Let me discuss the evidence on record and try to arrive at a definite finding as regards the issues framed.

DISCUSSION, DECISION, AND REASONS FOR THE DECISION

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ISSUE NO.1:

8. The defendants contended that the suit is not maintainable but failed to specifically state as to why the suit is not maintainable. The brief facts of the case of the plaintiffs is narrated above and it is seen that the plaintiffs have alleged that they entered into an enforceable contract with the defendant to purchase the suit land belonging to the defendant but the defendant failed and neglected to perform their part of the contract even though the plaintiffs are willing. It is seen from the above that the dispute is civil in nature; as such this Court has the jurisdiction to try the suit; hence it is held that the suit is maintainable.
9. DECISION: The suit is not maintainable as such the issue no:1 is answered in the affirmative and in favour of the plaintiffs.

ISSUE NO.3,4,5 and 6:

10. All the above four issues are intricately connected to each other; as such they are taken together for discussion for the sake of convenience.
11. The plaintiffs in order to prove their case had examined Shri Shanti Uddin Sk (PW1) who is also one of the plaintiffs and he had specifically deposed that they (plaintiffs) and the defendant, Shri Abdus Samad entered into an agreement in respect of the suit land and it was agreed that the plaintiffs would purchase the suit land upon sale consideration of Rs.8,40,000/- and out of the aforesaid amount an amount of Rs. 2,50,000/- was paid to the defendant. The PW1 had produced the said agreement of sale dated 18/10/2010 which is marked as exhibit 2. The PW1 had also identified the signature of the defendant, Shri Abdus Samad upon the exhibit 2 and the

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same is marked as exhibit 2(i) and 2(ii). The plaintiffs had also examined the writer (mohori) of the exhibit 2 namely, Shri Hamid Ali (PW2) and he had also specifically deposed that he drafted out the exhibit 2 and thereafter Shri Abdus Samad (Defendant) signed upon the same and he identified the signature of the defendant, Shri Abdus Samad which is marked as exhibit 2(i) and 2(ii). The defendant cross examined the above witnesses but nothing material could be elicited from their cross examination so as to doubt or disbelieve them in respect of the execution of the exhibit 2.

12. On the contrary, the defendant, Shri Abdus Samad had admitted about the aforesaid agreement in his deposition. The defendant, Shri Abdus Samad (DW1) had examined himself and in his examination in chief he had stated that in the month of August, 2010 he entered into a written agreement of sale with the plaintiffs and not on 18/10/2010. The DW1, Shri Abdus Samad further admitted that the sale consideration for the suit land was fixed at Rs.8,40,000/- and out of the aforesaid amount, the plaintiffs paid only Rs.1,10,000/- and not Rs.2,50,000/- as agreed. The DW1, Shri Abdus Samad further stated in his examination in chief that he again approached the plaintiff, Shri Shanti Uddin Sk after 2/3 days for another Rs.90,000/- but the plaintiffs did not pay; hence the said agreement of sale stood cancelled. It would be pertinent to mention herein that the DW1, Shri Abdus Samad had however admitted nearly all the allegations of the plaintiff during his cross examination and he had deposed contrary to what he had stated in his examination in chief. The DW1, Shri Abdus Samad had admitted in his cross examination that he agreed to sell the suit land to the plaintiffs and also admitted that the sale consideration was fixed at Rs.8,40,000/- and he had also admitted that he received Rs. 2,50,000/- from the plaintiffs as

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advance amount. It is seen from the specific admissions made by the defendant, Shri Abdus Samad in his cross examination that he had agreed to sell the suit land to the plaintiffs and that the sale consideration was fixed at Rs.8,40,000/- and out of the aforesaid sale consideration he had received Rs. 2,50,000/- as advance; as such it is held that the defendant, Shri Abdus Samad agreed to sell the suit land to the plaintiffs and he had received Rs. 2,50,000/- as advance out of the total sale consideration of Rs.8,40,000/-.

13. Moreover, the defendant's witness, Shri Golam Nabi Miah (DW2) had specifically admitted in his cross examination that he was present when the plaintiffs and the defendant entered into the written agreement to sell the suit land for sale consideration of Rs. 8,40,000/-. The DW2, Shri Golam Nabi Miah further identified the said agreement as exhibit 2 and also identified his signature thereon as witness and the same is marked as exhibit 2(iii). The DW2 further stated that the defendant executed the aforesaid agreement of sale. It is clearly proved from the above that the defendant entered into a written agreement to sell the suit land and exhibit 2 is the said agreement.

14. In view of the specific admissions made by the defendant and his witness and also in the light of the evidence of the plaintiffs it is held that the defendant had executed the exhibit 2 and he had agreed to sell the suit land for total sale consideration of Rs.8,40,000/- and out of the aforesaid amount he received Rs. 2,50,000/- as advance.

15. The learned counsel for the defendant had contended that the defendant did not execute the exhibit 2, but he had earlier executed a separate agreement, but the plaintiff did not produce the said agreement. The above contention of the defendant is not sustainable because the defendant had

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failed to produce any such agreement between himself and the plaintiffs. In fact the defendants did not plead in his written statement that he had entered into another written agreement in the month of August, 2010 and that he received only Rs.1,10,000/- from the plaintiffs out of the total sale consideration of Rs.8,40,000/- as such it is seen that the above contention of the defendant is beyond his pleadings and hence the same cannot be considered.

16. The plaintiffs have specifically pleaded that they were always ready and willing to pay the balance sale consideration but the defendant refused. The PW1 has specifically deposed that the plaintiffs were always ready and willing to perform their part of the contract, but the defendant neglected to execute the registered sale deed and so the plaintiffs issued a notice dated 23/9/2013, but the said notice was refused to be accepted by the defendant; hence the suit. The plaintiff (PW1) had produced the notice which was sent through registered post and envelop of the registered post containing the notice is marked as exhibit 3. The perusal of the exhibit 3 reveals that the same is addressed to the defendant and it contains an endorsement of the postal peon that the same was refused. The plaintiff (PW1) was not at all cross examined in this regard and moreover there is nothing on record to doubt or disbelieve the plaintiff (PW1) in this regard; as such it is held that the plaintiff issued the notice to the defendant to perform his part of the contract, but the defendant refused to accept the same.

17. In view of the above discussions it is held that the plaintiffs were ready and willing to perform their part of the contract, but the defendant neglected to perform his part of the contract.

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18. The defendant had deposed that he intended to purchase another plot of land from Abu Bakkar but the plaintiff did not pay the remaining agreed amount of Rs.90,000/- as advance and as such he could not purchase the said land from Abu Bakkar for which the agreement of sale with the plaintiffs stood forfeited. The defendant had also examined Shri Abu Bakkar (DW4) to prove that he (Defendant) intended to purchase the land from Abu Bakkar. In this regard I would like to submit that the defendant, Shri Abdus Samad (DW1) had admitted in his cross examination that he had received Rs.2,50,000/- as advance from the plaintiffs; as such it is seen that there is no question of receiving the balance advance amount of Rs.90,000/- as alleged by him. In fact the defendant had stated in his examination in chief that he received Rs.1,10,000/- from the plaintiffs as advance and he (Defendant) approached the plaintiffs after 2/3 days for the remaining Rs.90,000/-, but the plaintiffs could not pay the same as such the agreement of sale with Abu Bakkar (Exhibit A) stood forfeited, but in the cross examination he had specifically admitted that he received Rs.2,50,000/- as advance, which is more than the Rs.2,00,000/- allegedly agreed to be received as advance; as such it is held that the defendant had failed to prove that the plaintiffs failed to perform their part of the contract. On the contrary, the plaintiff had sufficiently proved that they had performed their part of the contract and were ready and willing to perform the remaining part of their contract.

19. It is further held that the cancellation of the agreement of sale (Exhibit A) between the defendant and Shri Abu Bakkar would have no consequence upon the instant case at hand, because the defendant had failed to prove that the said agreement was cancelled for non-payment of advance money by the plaintiffs. Moreover, the exhibit 2 does not contain any specific

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condition that the defendant would purchase the land from Abu Bakkar for which he requires the money from the plaintiffs and upon failure of the plaintiffs to pay the said amount within any specified period of time, the agreement of sale (Exhibit 2) would stand cancelled.

20. The learned counsel for the defendant had contended that the suit land is the joint property of the defendant and the proforma defendants and as such the specific performance of the aforesaid contract cannot be granted. The above contention of the defendant is not sustainable because in the defendant (DW1) had specifically admitted in his cross examination that the suit land belongs to him and he agreed to sell the suit land to the plaintiffs. In fact the DW5, Shri Asraf Ali Ahmed had also specifically admitted in his cross examination that the suit land originally belongs to the defendant and he has his residential house over the suit land. In addition to the above, the defendants had failed to bring on record and documents of title in respect of the suit land to show that the suit land is the joint property of the defendant and the proforma defendants; as such it is held that the defendant is the owner of the suit land and he cannot avoid the specific performance of the contract to sell the suit land.

21. The defendants as well as the proforma defendants had filed their joint written statement wherein they had specifically pleaded that they are the joint owners in respect of a plot of land 2 Bighas 1 Katha 3 Lessas, of which the suit land is a part. According to the defendants, the principal defendant had earlier sold a plot of land measuring about 1 Katha 5 Lessas to the plaintiff no:1, Shri Nasir Hussain besides the suit land. The fact that the principal defendant, Shri Abdus Samad had earlier sold 1 Katha 5 Lessas of the above referred total land to the plaintiff no:1, Shri Nasir Hussain shows

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that the principal defendant had sole transferrable right, title and interest over the said land and he had alone sole the same; as such the defendants as well as the proforma defendants cannot take the plea that the suit land is their joint property.

22. In view of the above discussions it is held that the principal defendant, Shri Abdus Samad entered into a written agreement to sell the suit land vide exhibit 2 to the plaintiffs and the total sale consideration of the suit land is fixed at Rs. 8,40,000/- out of which the plaintiffs paid Rs.2,50,000/- as advance as such Rs.5,90,000/- remained to be paid. It is further held that the plaintiffs were ready and willing to perform their part of the contract; whereas the defendant refused and neglected to perform his part of the contract; as such all the issue no:3,4,5 and 6 are answered in the affirmative and in favour of the plaintiffs.

23. DECISION: The principal defendant, Shri Abdus Samad entered into a written agreement to sell the suit land vide exhibit 2 to the plaintiffs and the total sale consideration of the suit land is fixed at Rs. 8,40,000/- out of which the plaintiffs paid Rs.2,50,000/- as advance as such Rs.5,90,000/- remained to be paid. It is further held that the plaintiffs were ready and willing to perform their part of the contract; whereas the defendant refused and neglected to perform his part of the contract; as such all the issue no:3,4,5 and 6 are answered in the affirmative and in favour of the plaintiffs.

ISSUE NO.2:

24. The learned counsel for the defendant had contended that the suit is barred by limitation; whereas the plaintiffs contended that the suit is instituted

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within the prescribed period of limitation.

25. The instant suit is instituted by the plaintiffs for specific performance of contract for sale of the suit land. It is already held above that the plaintiffs and the defendant entered into the written agreement to sell the suit land vide exhibit 2 which was executed on 18/10/2010. The perusal of the exhibit 2 reveals that no specific date for payment of the balance amount of sale consideration of Rs.5,90,000/- was fixed and no specific period of time or specified event was mentioned for the performance of the contract; as such it is held that the limitation would commence from the date of refusal of performance of the contract, which in the instant case is after the notice of performance dated 23/9/2013 was refused to be accepted by the defendant, i.e after 23/9/2013; as such it is held that this suit instituted on 11/11/2013 is well within the prescribed period of limitation of three years as prescribed under Article 54 of the Indian Limitation Act, 1963.

26. In view of the above discussions it is held that the suit is instituted within the prescribed period of limitation.

27. DECISION: The suit is instituted within the prescribed period of limitation; as such the issue no:2 is answered in the negative and in favour of the plaintiffs.

28. ISSUE NO:7 & 8:

29. In view of the discussions made above and the decisions reached in the foregoing issues, more particularly the issue no:3,4,5 and 6, it is held that the plaintiffs are entitled to the decree for specific performance of the contract to sell the suit land and for delivery of possession of the suit land.

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ORDER

30. In view of the above discussions and the decisions reached in the foregoing issues the suit of the plaintiffs is decreed on contest with cost. It is hereby decreed and directed that the plaintiffs do pay to the defendant the balance sale consideration of Rs.5,90,000/- (Five Lakh and Ninety Thousand) within three months from today and upon receipt of the same, the defendant, Shri Abdus Samad is directed to execute a formal registered sale deed in this regard and thereafter to deliver the possession of the suit land to the plaintiff and is permanently restrained thereafter from interfering with the possession of the plaintiffs.

31. The suit is decreed on contest with cost.

32. Prepare decree accordingly.

Given under my hand and seal of this court on this the 25th day of January, 2017 at Dhubri.

Yusuf Azaz,
Civil Judge, Dhubri.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

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APPENDIX

PLAINTIFF'S WITNESSES :

- 1) SHRI SHANTI UDDIN SK
- 2) SHRI HAMID ALI

DEFENDANT'S WITNESSES:-

- 1) SHRI ABDUS SAMAD
- 2) SHRI GOLAM NABI MIAJ
- 3) SHRI JABIR AHMED
- 4) SHRI ABU BAKKAR
- 5) SHRI ASRAF ALI

PLAINTIFF'S EXHIBITS :-

- 1) EXT. 1- POWER OF ATTORNEY
- 2) EXT. 2- AGREEMENT OF SALE DT. 18/10/2010
- 3) EXT. 3- REGISTERED ENVELOP
- 4) EXT.4- ACKNOWLEDGMENT CARD
- 5) EXT. 4(i)- POSTAL RECEIPT

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6) EXT.5& 6- COPY OF NOTICE

DEFENDANT'S EXHIBITS

1) EXT. 1 – AGREEMENT OF SALE DATED 21/10/2010

Yusuf Azaz,
Civil Judge, Dhubri.

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YUSUF AZAZ, CIVIL JUDGE, DHUBRI.